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The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction

Shmuel I. Becher*
& Esther Unger-Aviram**

ABSTRACT

The law of standard form contracts rests on intuitions. This Essay explores these intuitions and examines intended consumer behavior in common contracting contexts. The first study in this Essay focuses on the intent of consumers to read form contracts in four different scenarios. The second examines the extent to which prevalent rational-economic factors influence potential consumers in their intent to read form contracts.

Our findings support some of the common assumptions found in contract law literature and contradict others. The findings from the first questionnaire support the assumption that most consumers do not read most of the contracts in their entirety at the time of contracting. However, the findings do not support the assumption found in some literature that a substantial minority of consumers read their contracts and thus might discipline sellers. The results also show that many more consumers indicate a tendency to read contracts after the fact.

The findings of the second questionnaire show that at the time of contracting, the most prevalent rational-economic reasons for reading the contract are cost, length of contract and the prospects of influencing or changing contract terms. Cost and the chance to influence or change contract terms are also detrimental factors in consumers' intention to read form contracts after the fact, as is the opportunity to learn new things about their rights and obligations under the contract. Quite surprisingly, however, legal jargon, print density and font size are not key factors in consumers' decisions on whether to read their contracts. As the Essay explains, all of these findings might serve policy makers and courts in better designing the law that governs consumer form contracts.

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I. INTRODUCTION

Do consumers read their standard form contracts? Academics, not unlike the general public, seem to believe that they clearly do not. On this basis, legal scholars frequently invite courts and legislatures to protect consumers from allegedly biased contractual terms that sellers draft.

However, the assumptions and propositions that appear in the literature on consumers' reading patterns and contracting behavior largely rely on personal belief or intuition. Reliable and testable information on this subject is hard to find.¹ Yet, basing the legal treatment of consumer contracts on intuition and general beliefs can lead to contradictory recommendations, as well as inefficient, unjust and erratic results.

This Essay attempts to take a modest yet important step to close this gap. By providing data on consumers' contracting behavior, we offer courts and legislatures initial tools that will better allow them to address consumer contract law. We do so by examining two closely related issues: first, whether consumers read their form contracts; and second, what factors influence consumers' contracting behavior.

1. See generally, Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

A basic assumption of contract law and theory is that parties are well aware of the content of a contract prior to its formation. Presumably, reading the contract and negotiating its terms allows parties to reach informed decisions. This in turn advances the welfare and enhances the autonomy of the contracting parties.

With various contracts, the assumption that contracting parties are familiar with their content is often invalid. In the context of consumer standard form contracts (SFCs), this assumption seems counterintuitive. Most often, SFCs involve parties of unequal bargaining power in terms of market power, legal expertise, business sophistication and commercial experience. Usually, there is little or no opportunity for the consumer to negotiate the terms of the agreement, which is typically offered on a “take-it-or-leave-it” basis.²

Numerous consumer transactions are governed by SFCs. Form contracts are used by insurance companies, internet service providers, travel agencies, banks, credit card issuers and health clubs, to name just a few. This Essay focuses on this most pervasive kind of contract.

Clearly, SFCs are a necessary product in the era of standardization and mass-market transactions. The most apparent advantage of an SFC is its potential to reduce transaction costs by simplifying and shortening the negotiation process. Accordingly, sellers are not likely to negotiate an SFC *ex ante* (that is, at the time of contracting) or to allow deviations from pre-printed forms. Most frequently, the costs of negotiating individual contracts will exceed the potential profit from “routine” transactions. Hence, to avoid excessive transaction costs, sellers prepare pre-printed forms and allow the potential consumer little time or space to read, negotiate or contest the terms.

Furthermore, to avoid potential loss of any kind (legal or monetary), the typical seller does not empower its representatives (salespeople) to make changes in an SFC. Allegedly, since consumers usually do not negotiate, read or understand SFCs, such contracts create a potential market failure: asymmetric (or imperfect) information.³ Where consumers are not aware of the content of their contracts, sellers have a profit incentive to provide contractual terms of the lowest quality possible.⁴ The terms included in SFCs may at times seek to

2. See generally, Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

3. See generally, Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723 (2008).

4. See generally, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

alter the legal rights that are usually granted to the consumer.⁵ Accordingly, academics call on courts and legislatures to intervene and provide consumers with adequate protection and relief.

SFCs are ubiquitous, and their theoretical foundations have undergone enormous development.⁶ Still, empirical findings on consumers' behavior have been slow to appear.⁷ Very few writings rest on actual data gathered from field or laboratory settings. This Essay seeks to provide such data.

To achieve this goal, we administered two questionnaires. In the first, we examined prospective consumers' contracting behavior in four contexts. After analyzing the answers to the first questionnaire, we learned, contrary to common assumptions in contract law literature,⁸ that it is by no means the case that consumers do not read their SFCs as a matter of course. To probe what factors play an important role in consumers' decisions whether to read an SFC, we formulated a second questionnaire. In it, we studied the extent to which main rational-economical variables, as commonly found in literature, indeed influence consumers' intention to read SFCs *ex ante* and *ex post*. Once again, and as detailed below, some of the results were counterintuitive, while others confirm common assumptions made by courts and academics.⁹

Part I of this Essay provides the three basic narratives pertaining to consumer contracting behavior found in current literature. It provides the reader with the necessary yet regrettably brief background to SFCs, while the narratives are examined in detail thereafter. Part II elaborates on the first study. It contains the method section, in which we describe how we presented the first questionnaire to the respondents, the research results, and the implications of the questionnaire.

5. See generally, Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995). Commentators frequently assert that SFCs exploit consumers' ignorance and are thus one-sided. Empirical examinations reinforce this view, at least when SFC terms are compared with UCC default rules. See Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 703, 713 (2007) (finding that "[End User License Agreements] are almost always more pro-seller than the default rules of the UCC.>").

6. For one example, see Symposium, "Boilerplate": *Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006).

7. For one survey of online contracting behavior see generally, Robert A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 282 (Jane K. Winn ed., 2006). For one recent study that contains data regarding this matter, see generally, Debra P. Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617 (2009).

8. See *infra* note 14 and accompanying text.

9. See *infra* Part III.B-C.

Based on our findings, Part III moves forward to delineate our second questionnaire and its results and implications. The last section of the Essay, Part IV, concludes.

II. THE THREE TALES OF CONSUMERS' CONTRACTING BEHAVIOR

Current literature that deals with consumer SFCs details three alternative "stories" about consumers' alleged contracting behavior.¹⁰ In this section, we outline these stories, explain their rationales, and point to their origins.

A. *The Conventional Story: Consumers do not read their SFCs*

The conventional narrative of consumer behavior and contract law assumes that consumers do not read the entire contract when entering into their contracts.¹¹ They refrain from doing so, according to this line of argument, for various good reasons.¹² Scholars suggest categorizing those reasons into three groups: (i) rational-economic reasons (e.g., reading costs that exceed the anticipated gains from reading); (ii) cognitive causes (e.g., information overload and self-serving biases that lead consumers to believe they are risk-free); and (iii) social rationales (e.g., the fear of being conceived by others as suspicious and uncooperative).¹³

By and large, the basic assumption that consumers do not read SFCs in their entirety, however persuasive, has not been established empirically.¹⁴ Instead, writers seem to regard this assumption as common knowledge. Scholars indeed recognize the paucity of empirical data on this subject,¹⁵ noting that the literature does not furnish such statements with solid proof. By and large it is all intuition.¹⁶

10. See *infra* Part I.A-C.

11. See Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435-36 (2002).

12. See *id.* at 445-54.

13. See *id.*

14. For a recent exception in the field of software license agreements, see generally Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, (Oct. 6, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256.

15. See Rakoff, *supra* note 2, at 1179 (stating that "[v]irtually every scholar who has written about contracts of adhesion" accepts the idea that "the adhering party is in practice unlikely to have read the standard terms.") See also, e.g., Korobkin, *supra* note 4, at 1217 n.45 ("There appears to be little direct empirical data on this [actual contracting behavior] point"); Hillman, *supra* note 1, at 841 n.24 ("Few empirical studies examine consumer reading of standard forms in the paper word. Most commentators merely cite or quote Todd Rakoff's piece on contracts of adhesion for the proposition that consumers do not read standard forms.").

16. For a few examples, see Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 680 (2004) (noting that "commentators agree that buyers, or the vast majority

Based on the assumption that consumers do not read SFCs, regulators, courts and academics call for intervention aimed at protecting consumers from invidious hidden contractual terms that exploit their ignorance.¹⁷ However, before this generalized assumption regarding consumers' reluctance to read is used as a justification for legal intervention, further solid insight is warranted. Accordingly, the first hypothesis we tested in our study is that most consumers do not read SFCs in their entirety¹⁸ at the ex ante stage.¹⁹

B. *A "Law and Economics" Version: You Can Fool Some Consumers Sometimes, But You Can't Fool All the Consumers All the Time*²⁰

Whereas virtually all commentators agree that consumers do not read their SFCs as a matter of course, some academics argue that a fraction of consumers do read some of their contracts some of the time. Under relevant circumstances, the argument contends, this phenomenon (of partial reading) may suffice to discipline sellers to draft fair and efficient SFCs.²¹ As explained next, whether or not some con-

of them, do not read the terms presented to them by sellers."); Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1163 (1976) (opining that "[i]n general the consumer will not have read any of the clauses, and most will be written in obscure legal terms."). Sometimes this assumption partly relies on one's personal contracting habits. See, e.g., Richard A. Epstein, *Contract, not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY', 205, 227 (Jane K. Winn ed., 2006). ("[I]t seems clear that most consumers—of whom I am proudly one—never bother to read these terms anyhow: we know what they say on the issue of firm liability, and adopt a strategy of 'rational ignorance' to economize on the use of our time.").

17. For one example see Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 730-34 (1992) (asserting that since consumers do not read their SFCs and in light of sellers' superior ability to handle the risk of litigation in distant forums, it would be efficient to assign such a risk to sellers).

18. The focus on reading the entire contract (rather than parts of it) is due to the fact that harsh terms in one part of an SFC can be balanced by concessions made in another. In other words, without reading the contract as a whole, one is not likely in most cases to evaluate it correctly.

19. As detailed below, we examine this hypothesis while keeping in mind the question of whether specific factors or circumstances (which relate to the nature of the transaction at stake) can influence the inclination of consumers to read their SFCs. For example, our questionnaire addresses the question of whether consumers will change their contracting behavior when the SFC at stake concerns the well-being of another (dependent) individual, as opposed merely to potential monetary loss. The second study examines factors that relate to the contract itself, rather than the kind of transaction one enters.

20. With apologies to Bob Marley. For further explanation, see THE WAILERS, *Get Up, Stand Up, on BURNIN'* (Island Records 1973).

21. See, e.g., Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979). Another premise

sumers indeed read their form contracts is a crucial point that might affect the need for regulating the market for contract terms.

This (generally anti-intervention) law and economics approach is premised on competitive market forces, which allegedly generate a desired equilibrium whereby vendors have adequate incentives to draft efficient standardized terms. Once again, the proponents of this approach acknowledge that SFC terms are not typically read by consumers prior to finalizing the transaction. Yet they argue that, in competitive markets, the fact that some consumers (hereinafter, marginal consumers) do read contractual provisions, and are willing to search for better ones, should suffice to deter sellers from incorporating one-sided terms in their SFCs. By this reasoning, a vendor that incorporates unfair or unjust provisions in its contract risks losing marginal consumers to a competitor that offers preferable terms. As firms respond to consumers in the aggregate and provide products that will match their preferences, competitive market forces will induce firms to refrain from exploiting consumers through self-serving clauses. According to this logic, market pressure, generated by a group of marginal consumers that operate in a competitive market, will substantially reduce the need for legal intervention in the content of SFCs. In other words, a dynamic that makes legal intervention in SFCs unnecessary will emerge in markets in which the cost of losing marginal consumers (due to the use of unfair contractual terms) will outweigh the benefits of extorting non-marginal consumers (who remain subject to the unfair and biased contractual provisions).²²

Taking this approach into account, the policy response to the fear of unfair SFCs should be limited to encouraging drawing up contracts using simple, short and plain language. Such contracts will enlarge the fraction of consumers that are willing to invest resources in reading SFCs and will assist marginal consumers to signal their discontent with the given SFC. In addition, regulators should promote competition, which will render marginal consumers more powerful and will ensure that they have sufficient options to switch to, thereby indicating their discontent with biased SFCs.

As before, the argument about an informed minority of consumers who read SFCs and bring about efficient and fair market equilibrium has not been tested empirically. Academics address this argument

in this context is that for the fraction of consumers who read the entire contract to discipline sellers to draft fair and efficient contracts, "at least one-third of consumers must be informed to protect the remaining consumers' interests." Goldman, *supra* note 17, at 719.

22. See R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635 (1996).

without providing any empirical data on the matter. Consider, for instance, the following quote:

While it is an *article of faith* that most purchasers will not read terms [of SFCs], it is also *plausible* that at least some purchasers will. . . . Much of the legal literature on SFCs, at least since the path-breaking work of Alan Schwartz and Louis Wilde, has dealt with the conditions under which the presence of reading buyers can serve as a proxy for nonreading buyers.²³

Whereas the first tale presented above assumes that consumers do not read SFCs as a matter of course, the law and economics version of consumer contracting behavior discussed in this Part presumes that a substantial minority of consumers do. Accordingly, there might be good reason not to hasten to intervene in the market for contract terms. Hence, our study further tests the prediction that at least a third of consumers read SFCs in their entirety at the time of contracting (the *ex ante* stage).

C. *The Hindsight Tale: (More) Consumers Read SFCs after the Fact*

Some academics submit that the mere fact that consumers have their SFCs available after entering the transaction does not necessarily entail greater readership at this later point in time. Hillman, for instance, argues that “consumers are as unlikely to read terms after a transaction as during one.”²⁴ Yet, a third theme in current scholarship asserts that reading contracts is indeed much more likely to occur *ex post* than *ex ante*.²⁵ Next, we delineate why *ex post* reading matters and explain the rationales for this alleged phenomenon.

Ex post reading is important for various reasons. Although parties form their understandings at the time of contracting, reading the contract *ex post* can prove highly beneficial. The reasons consumers read their contracts at the *ex post* stage are mainly two. First, they might want to become familiar with their rights and obligations and be able to respond accordingly. Second, consumers might seek to alter the contract they have previously entered. At this relatively late stage, the consumer perceives that the costs of accepting the conditions of the contract may be too high or outweigh the expected benefits, so the contract should be (re)examined and rectified. If the losses are too

23. Gillette, *supra* note 16, at 690-91 (emphasis added).

24. Hillman, *supra* note 1, at 844.

25. See Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303 (2008). This third tale deals with the *ex post* stage *where a dispute or a problem arises* (that is, the point in time after the item or service purchased has failed to satisfy the consumer's expectations). *See id.*

great to bear, or they outweigh the benefits, the individual consumer will seek to cut or lessen them.

There are several reasons for a seller to agree to renegotiate an SFC after the consumer has purchased a product or service. First, sellers fear undermining their own reputations by insisting on the language of one-sided contracts. Once a product has failed to satisfy consumers' expectations, sellers can quite easily identify buyers who are assertive enough to speak out and insist upon the legitimacy of their complaints. In many cases, those consumers will be granted relief, because sellers will either aspire to minimize contact with "troublemakers" or fear undermining their reputations. At the same time, aggrieved consumers who do not display persistence and assertiveness will bear losses. This practice is termed "ex post discrimination."²⁶ Such discrimination becomes even more evident (and problematic) once we realize that standardized exculpatory terms, if read, may deter consumers from pursuing their rights and seeking compensation.²⁷ Thus, where ex post discrimination occurs, all consumers will be offered biased, unfair terms, and only assertive marginal consumers will get their way, after negotiating their SFCs.

Additionally, sellers might employ biased contracts but regularly waive contractual rights in order to enhance their reputation.²⁸ That is, they might incorporate unfair terms just to waive them later on. According to this explanation, when aggrieved (ex post) consumers turn to vendors for relief, the latter will first refer them to the relevant (albeit imbalanced) contractual provision. Thereafter, vendors will inform their consumers (or at least the more persistent ones) that their consumer-friendly policy (in the case at stake or more generally) is to forgo their own contractual rights.²⁹

26. Another possible kind of discrimination is an ex ante one, where sellers provide different consumers with different terms at the time of contracting (presumably employing more egregious terms with non-sophisticated consumers). However, and as we rationalized in the introduction, it seems that this is not a common phenomenon. For an empirical assertion that this is indeed not the case in the field of software license agreements, see Marotta-Wurgler, *supra* note 5, at 680 ("EULAs associated with products targeted toward the general public are not significantly more pro-seller than the EULAs associated with business-oriented products. . . . I am able to cleanly test, and reject, the hypothesis that sellers actively discriminate between buyer types through the terms they offer to them").

27. See Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83 (1997).

28. See Cruz & Hinck, *supra* note 27; see also Gillette, *supra* note 16.

29. To use the behavioral economics jargon, sellers may use this tactic in order to cause an anchoring effect: setting a rigid starting point, and thereafter negotiating down.

The literature offers another basic strategy for ex post negotiation, which leads vendors to waive their contracting rights (as formulated in the SFC). According to this strategy, vendors might provide consumers with ex post relief as long as the latter do not engage in opportunistic behavior.³⁰ This implies that ex post discrimination allows firms to insist on the lopsided contractual terms when dealing with bad-faith, unfaithful or “problematic” consumers. At the same time, sellers will exercise discretion and exhibit flexibility aimed at retaining “good customers.” Once again, vendors do so by not insisting on the harsh contractual terms originally incorporated into the relevant SFC.

Moreover, if a good enough information flow exists, sellers might refrain from using too-harsh SFCs from the very beginning. This might be the case when experienced (ex post) consumers can share their experiences with potential (ex ante) consumers effectively and efficiently. Once potential consumers can easily receive credible and valuable information from experienced consumers who have run into problems with a given seller or SFC, sellers might worry about their reputation. This, in turn, might discipline sellers and encourage them not to use (overly) biased contracts.³¹

Therefore, although somewhat counterintuitive, ex post reading indeed matters. From the perspectives of both consumers and sellers, ample reasons seem to exist for not reading SFCs ex ante while leaving their terms open to ex post negotiation. According to this line of reasoning, whereas it is basically true that contracting parties do not negotiate SFCs ex ante, actual contracting around the SFC content is more likely to take place at the ex post stage. This phenomenon, accompanied by sellers’ reputational concerns, might deter sellers from drafting egregiously one-sided contracts.³² In addition, it may deter sellers from insisting on the lopsided contractual language. Generally speaking, this potential phenomenon also renders legal intervention less necessary.

Once again, none of these speculations regarding ex post reading and negotiation between businesses and consumers are borne out by any findings of which we are aware. Thus, this line of argument points to the next and last hypothesis examined in our first study: that the

30. See Gillette, *supra* note 16; see also Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Market*, 104 MICH. L. REV. 827 (2006).

31. For a detailed development of this argument, its pitfalls and its potential, see Becher & Zarsky, *supra* note 30.

32. Indeed, although EULAs seem to be consistently one-sided, they do not reach the most extreme possible bias toward sellers. See Marotta-Wugler, *supra* note 5, at 703.

proportion of consumers who read SFCs *ex post* is significantly larger than the proportion who read them *ex ante*, at the time of contracting.

III. THE FIRST STUDY: DO CONSUMERS READ THEIR CONTRACTS?

To expand our understanding of how SFCs impact consumer behavior and decision-making, we set out to examine the tendency of potential consumers to read or negotiate SFCs. Gathering this data is a first step in obtaining a better comprehension of the ways in which policy-makers should approach the unsettled issue of legal intervention in consumer contracts. Accordingly, the purpose of the first study is to examine the three narratives on consumers' behavior as detailed in the previous section. Below, we elaborate the sample, the questionnaires, the results and their implications.

A. Method

Sample. One hundred and forty-seven respondents volunteered to fill out a questionnaire. The population that participated in this study was a heterogeneous group of students from two different academic institutions. The students were studying toward a Masters degree in management, business administration or legal studies (n=96), a Bachelors degree in law (n=23), or had already completed a Masters degree (n=23) in other areas (five respondents did not indicate their degrees).³³ At least forty-eight of the respondents were females and at least eighty-nine respondents were males (ten respondents did not indicate gender), with various income levels.³⁴

Questionnaire. Two versions of the questionnaire were designed to examine the propensity of individuals to read SFCs. Each version included two *ex ante* and two *ex post* scenarios, and contained four different types of scenarios that any individual respondent was likely to

33. Eighty-nine students had no prior knowledge in contract or consumer law; fifty-eight students had completed both contract and consumer law courses.

34. We regard our participants' diversity as one of our study's valuable aspects. As the records indicate, participants' education, social status and age varied substantially, so their behavior may better represent the behavior found in the real population. For instance, respondents' monthly income level ranged from up to NIS 5,000 (n=69) to NIS 5,001-7500 (n=45) to NIS 7,501-10,000 (n=14) and higher (n=16). As of June 29, 2009, the exchange rate is approximately NIS 3.95 to USD 1 (the average monthly Israeli income is approximately NIS 7,600). See generally The Central Bureau of Statistics (Israel), <http://www.cbs.gov.il/reader>. For an argument that there is a significant positive correlation between the annual income and education level of a participant and the tendency to report reading SFCs, see Stark & Choplin, *supra* note 7. For a discussion of the sample and its possible shortcomings see *infra* note 63.

encounter, some more often than others, some of higher cost and value than others.

The different scenarios allowed us to examine how far generalizations about consumer tendency to behave consistently in all ex ante and ex post scenarios could be made. Each version included scenarios that occurred in the following four consumer-business relationships: bank, car-rental agency, laundry services, and prestigious nursery school. The first three scenarios, although different in context, are similar in that they do not concern the wellbeing of a dependent individual (i.e., a child). In these scenarios, any wrongdoing may result in monetary damages, some greater than others. The fourth scenario, the nursery school, differs from the other three in that not only monetary damage may be incurred, but the physical and mental wellbeing of a dependent child may be at risk, also. Therefore, although this scenario indeed portrays a situation that one may commonly encounter, the responsibility and potential damage and loss are of a different nature and may therefore call for more cautious behavior on the consumer's part. Put differently, these diverse scenarios allowed us to examine whether a consumer's behavior might depend on the particular context of the SFC at stake.

The questionnaires were randomly distributed to the participants. Each participant filled out one questionnaire. Below, we detail the instructions and scenarios contained in the questionnaires.

Ex Ante Instructions and Scenarios

The instructions for the ex ante scenarios were as follows: "Described below are several events which we are all likely to encounter. Please read each of the events and indicate your contracting behavior accordingly."

In the first version of the questionnaire, the two ex ante scenarios involved renting a car and opening a bank account. In the first, participants were told the following: "You fly out for a vacation. You have landed at the airport, and now you want to rent a car for a week. Before you are five car-rental counters (Hertz, Rent-a-Car, Avis. . .). You go up to one of the counters, at random, and ask for a compact car (category A). The agent hands you a standard rental contract. Will you read the contract?" Next, the respondent had to choose among one of the four alternatives provided:

- (1) I will read through the entire contract, and then I'll sign it.
- (2) I will skim through the contract, or read part of it, and then I'll sign it.
- (3) I will sign the contract without reading it, but I'll take it with me to read at a later time.

- (4) I will sign the contract without reading it, and I will not read it at a later time.

In the bank scenario, respondents were told the following: “You open a checking account at a bank. The clerk hands you a standard contract to sign. Will you read the contract?” Here too, the respondents were asked to identify their contracting behavior from among the four alternatives listed above.

As noted, the second version also contained two *ex ante* scenarios, one about laundry services, the other, registration at a nursery school. The laundry scenario read: “You deliver some clothes for washing and ironing at the laundry. The owner hands you an invoice/receipt for your signature; on the back of it is a list of the items you have delivered, the service required, and several more conditions. Will you read the invoice/receipt?” As before, the respondents were asked to choose their contracting behavior out of the four alternatives presented above.

Lastly, the nursery school scenario read: “You register your two-year-old child at a private and prestigious nursery school, after being on a waiting list for several months. Once your child has been accepted, as part of the registration procedure the teacher asks you to sign a contract. How will you act?” Once again, the respondents were asked to choose their contracting behavior from among the four alternatives noted above.

Ex Post Instructions and Scenarios

The *ex post* scenarios related to the same four themes listed above. The two *ex post* scenarios in the first version included the laundry and the nursery school. The laundry scenario read: “You handed in a suit for dry cleaning, but you forgot to pick it up. Two and a half months later, just before an important family occasion, you looked for the suit and remembered that you hadn’t collected it from the cleaners. You call them, and they tell you that they no longer have the suit because more than two months have gone since you handed it in. Which of the following best describes your response to this incident?” The respondents were then asked to mark their chosen course of behavior. The instructions further noted: “If more than one response is possible, or you choose a sequence of responses, please write 1 next to your first response, 2 next to your second response, and so on.” The options included the following five:

- (1) I will give in. It was up to me to collect the suit on time.
- (2) I will try to pressure the cleaners for compensation despite their answer.

- (3) I will consult a lawyer. Perhaps the owner of the dry cleaners is not acting in a legal manner.
- (4) I will read the invoice I got, setting out the conditions of cleaning and the responsibilities of each party.
- (5) If I conclude that there are grounds for my claims I'll sue the dry cleaners.

The ex post nursery school scenario read as follows: "Your child is enrolled at a private and much sought-after nursery school. Toward the middle of the school year you are informed that you have to go abroad with your family, for work purposes, for two years. The nursery-school teacher informs you that because you are leaving in the middle of the school year you must continue to pay the fees for the remaining five months of the year.³⁵ Which of the following best describes your response to this incident?" Here too, the instructions were identical to those provided in the ex post laundry scenario.

In the second version, the two ex post scenarios addressed a car rental and bank scenario, with identical instructions. The car rental scenario read: "You fly out for a vacation, and rent a compact car (category A) for a week. The following day you have driven far out of town and you realize that the air-conditioning in the car isn't working. You call the rental company. They tell you that considering your location and the kind of problem, they are not obliged to help you, and you must manage on your own. Which of the following best describes your response to this incident?" The second ex post scenario involved a bank incident which read: "Your bank debit card was stolen, and used for unapproved purchases.³⁶ You informed the bank within 24 hours. The bank refuses to credit your account, claiming that this was the third time you had reported the theft of your card in the previous 12 months." Once again, the respondents were asked: "Which of the following best describes your response to this incident."

B. Results

In this part, we present the results of the hypotheses testing. First, we address those concerning the ex ante stage, and then we discuss those concerning the ex post stage.

1. The Ex Ante Stage

Our first hypothesis was that most consumers do not read SFCs in their entirety at the ex ante stage. In the car rental scenario, a large

35. The respondents were told that the fees amount to NIS 10,000.

36. The respondents were told that the unauthorized purchases were in the amount of NIS 3,000.

majority of the respondents, 81% (N=61), stated that they would not read the contract in its entirety. However, 60% of the respondents (N=45) indicated that they would skim through or read parts of it prior to signing. In the bank account scenario, 92% of the respondents (N=69) said that they would not read the contract in its entirety. Again, a substantial proportion of the respondents, 47% (N=35), indicated that they would skim through or read parts of the contract before signing. As expected, a solid majority indicated no intention to read SFCs in one of ex ante scenarios of the second version, as well. In the laundry scenario, 75% of the respondents (N=54) reported that they would not read the contract in its entirety. Consistent with the previous two ex ante scenarios, 61% of the respondents (N=44) indicated that they would either skim through or read selected parts of the contract prior to signing.

The results in these three scenarios have much in common. In all three cases, large majorities indicated no intention to read the SFCs in their entirety. Yet, a large proportion of the respondents stated their inclination to skim through the contract or read it selectively.

Interestingly, different results were found in the nursery school scenario. Here, only 24% (N=24) indicated no intention to read the contract in its entirety. In other words, 76% of the respondents (N=55) stated that they would read it through. An additional 17% (N=12) said that they would either skim through or read only selected parts of the contract prior to signing it. The remaining 7% (N=5) indicated that they would sign the contract without reading it, but intended to read it at a later time. Table 1 below summarizes these results.

TABLE 1. PERCENTAGE (PROPORTION) OF CONSUMERS WHO REPORTED A TENDENCY NOT TO READ SFCs EX ANTE

| <u>Version 1</u> | <u>Version 2</u> |
|-----------------------------|-------------------------------|
| Car rental 81% (61/75) | Laundry 75% (54/72) |
| Bank Account 92% (69/75) | Nursery School 24% (17/72) |

Thus, the hypothesis that the vast majority of consumers do not read SFCs receives partial support. In three out of the four scenarios (i.e., bank, laundry, car rental scenarios), consumers indeed reported that they would not read SFCs in their entirety at the ex ante stage. By contrast, in the nursery school scenario, most consumers reported an inclination to read the contract in its entirety prior to signing. Therefore, the hypothesis is partially supported.

Our second hypothesis was that a substantial minority – at least a third – of consumers are inclined to read SFCs in their entirety at the ex ante stage, thus disciplining sellers. To test this hypothesis, we used Z tests to determine if the difference between the sample mean of each scenario and the theoretical mean of the population (at least 33.3%) was statistically significant.

These analyses show that in two scenarios – the car rental and the bank account – a significantly smaller proportion than one third (33.3%) of the consumers reported a tendency to read the contract ex ante: $z = -2.39$, $p = 0.008$; and $z = -3.92$, $p = 0.000$, respectively. In the laundry scenario, 18/72 (25%) of the respondents indicated that they would read the contract ex ante. This is not significantly different from the proposed one third: $z = -1.36$, $p = 0.08$. Of course, in the nursery scenario, a proportion significantly larger than one third indicated that they would tend to read the contract ex ante: $z = 13.18$, $p = 0.000$. Thus, in two scenarios (car rental and bank) out of the four, the proportion of the consumers that report a tendency to read the entire contract ex ante was significantly smaller than the assumed one third.

2. The Ex Post Stage

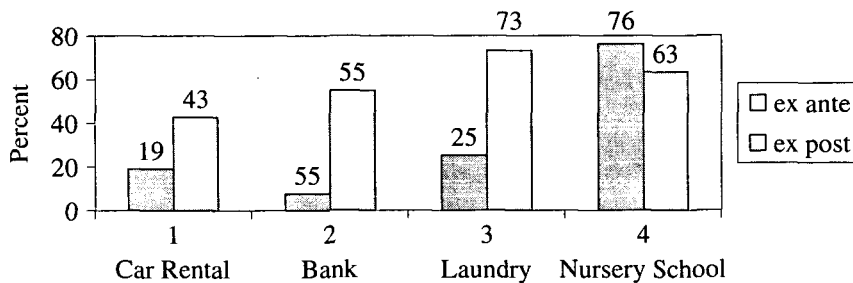
Our third hypothesis was that the proportion of consumers who read SFCs ex post (once having encountered a problem) will be significantly larger than the proportion who read them ex ante (at the time of contracting). Here too, Z tests were used to determine if, in each scenario, the difference between the intent to read SFCs ex post was significantly larger than the intent to read them ex ante.

Indeed, a significantly larger proportion of consumers reported that they would read the contract ex post (rather than ex ante) in three out of the four scenarios: car rental, $z = 4.99$, $p = 0.000$; bank account, $z = 17.69$, $p = 0.000$; laundry, $z = 14.54$, $p = 0.000$.³⁷ Once again, the only

37. Furthermore, a large proportion of respondents indicated that they may read SFCs ex post as their second reaction. For instance, in the laundry scenario, whereas forty-five out of the sixty-two people who answered this question indicated they would read the SFCs as their first reaction, fifteen indicated they would do so as their second reaction (assuming their first reaction had not resolved the dispute). This amounts to sixty out of the sixty-two respondents (97%) who might read the SFCs as their first or second response. In the nursery school scenario, thirty-five out of fifty-six who answered this question indicated they would read the SFCs as their initial reaction, while an additional twenty reported they might read the SFCs as their second reaction (again, assuming their first course of action had not resolved the dispute). This amounts to fifty-five out of fifty-six respondents (98%). In the car rental scenario, twenty out of forty-seven claimed they would read the SFCs as their first response, and an additional twenty-five might read the SFCs as their second choice of behavior. This amounts to forty-five out of forty-seven respondents (96%) who might read the SFCs as their first or second reaction. Lastly, in the stolen credit card scenario, twenty-eight out of fifty-one indicated they would read SFCs as their

exception was the nursery school scenario, in which a significant majority of the respondents indicated that they would read the entire contract before signing it, $z = -1.83$, $p = 0.03$. Diagram 1 below summarizes the comparison of the two stages.

DIAGRAM 1. Percentage of consumers that read SFCs ex post as compared with the percentage that read them ex ante



C. Discussion and Implications

The major contributions of this study are twofold. First, it provides a preliminary empirical test of the assumptions found in the literature with respect to consumer contracting behavior. By and large, current writings merely speculate on how consumers behave with respect to SFCs. This study, however, examines potential consumers' reported behavioral tendency in four different scenarios. Although we measure potential and not actual behavior, this is an improvement on mere speculation. The measurement of actual consumer behavior is indeed warranted, but our results show that even in intent, some of the assumptions provided in the literature receive empirical support, whereas others do not. The results of this study, therefore, justify further investigation of actual consumer behavior. Until such data is gathered, our results may assist policymakers and courts in formulating better guidelines for the legal treatment of SFCs.

Second, the findings negate some current assumptions about consumers' behavior at the ex ante stage and reinforce others. Our findings show that the vast majority of consumers do not intend to read the entire SFCs into which they enter.³⁸ Thus, policy recommendations aimed at protecting consumers at the time of contracting seem warranted insofar as they are based on the fear of imperfect information, pertaining to contractual parts (or contracts) that consumers do

first choice, and nineteen as their second choice. This amounts to forty-seven out of fifty-one respondents (92%) who might read SFCs as their first or second choice.

38. This finding is in line with Stark & Choplin, *supra* note 7.

not read and of which they are therefore not aware.³⁹ However, the results also indicate that potential consumers report a tendency to read parts of, or skim through, SFCs. Market forces are more likely to suffice and deter sellers from incorporating one-sided terms with respect to conspicuous (salient) contractual aspects that consumers read and understand.⁴⁰ Future research is thus required to determine which parts of SFCs consumers tend to read or skim through, and which parts they do not.

Furthermore, the study validates a current assumption regarding consumers' behavior at the *ex post* stage. The data reveals that most potential consumers report a clear tendency to read SFCs as a first reaction once a legal dispute arises. This implies that policymakers should encourage a flow of information among consumers, from experienced ones (who read the SFC *ex post*) to potential ones (those who consider entering a transaction, at the *ex ante* stage).⁴¹ Accordingly, when courts decide SFC cases, one factor to be considered is the *ex post*-*ex ante* flow of information. When a strong flow exists, vendors are more likely to have a profit incentive to refrain from using one-sided clauses in their SFCs.

The *ex post* findings also support the assumption that the terms contained in SFCs may indeed influence and shape consumers' behavior in a broader sense. The fact that many consumers consult their SFCs as their first choice of action once a dispute surfaces indicates that consumers tend to attribute importance to the content of their contracts. In this sense, it is only reasonable to assume that most consumers believe they are bound (at least to a certain degree) to the contract's language. This might strengthen the need to protect consumers against unscrupulous or unconscionable terms, which consumers nevertheless tend to perceive as binding.⁴²

Lastly, the data demonstrates that it might be a mistake, at least in some contexts, to address SFCs without distinguishing among the many different kinds of consumer contracts and fields of commerce. The first study indicates that some contracts are read significantly more than others. As described, one of the scenarios explored in this

39. Slightly restated, legal intervention is particularly defensible pertaining to unread and unnoticed (i.e., non-salient) contractual terms. See, e.g., Korobkin, *supra* note 4, at 1244.

40. Note, however, that consumers' ability to understand and absorb the information they encounter in their SFCs (rather than merely reading it) deserves a distinct study, which we hope to perform separately.

41. See Becher & Zarsky, *supra* note 30, at 357-65. This conclusion is further supported by the fact that many additional consumers report the intention to scrutinize the form contract as their second choice of action.

42. See, e.g., Stolle & Slain, *supra* note 27.

study – the nursery school – yielded results that differ substantially from the others. One possible explanation for the high percentage of reading consumers in this scenario is its exceptional and special nature: it involves mainly wellbeing, rather than monetary aspects. Another possible explanation might be found in the fact that the potential consumers were told they were on a waiting list for a few months. This may enhance consumers' anticipation and commitment.

We hence suggest that future research focus on obtaining a deeper understanding of the factors that lead consumers to read SFCs. Such research should focus on factors that relate to the SFC itself (e.g., font, language, length - as we examine in our next study below) as well as on factors that relate to the nature of the transaction at stake. Diverse SFCs might justify different legal treatment. Contracts that are read by most (or many) consumers will usually not justify the same concerns, scrutiny and protective measures as SFCs that are not read.

IV. THE SECOND STUDY: RATIONAL-ECONOMIC FACTORS

The first study showed that some consumers read some of their contracts some of the time. It also demonstrated that some contracts are read significantly more often than others. With this in mind, we designed a second questionnaire to clarify further the main factors that lead consumers to read (or not read) SFCs. As noted, the literature details three kinds of factors that prevent consumers from reading their SFCs: rational-economic, cognitive, and social.⁴³ Our second study focuses on the first of these.

Roughly defined, "rational-economic" refers to factors that can be attributed to a rational decision-making process. For instance, the smaller the font of the contract, the harder it is to read. This is a relatively objective factor. Similarly, other factors being equal, the longer the contract, the more time it takes to become familiar with the contract, and hence, the more consumers will tend not to read it. To complete the list, aside from font size and length of contract, the second survey probes for the following additional four factors: (1) cost (i.e., the price of the transaction at stake); (2) the prospects of changing the contract's language; (3) the possibility to learn about the rights and obligations of the contracting parties by reading the contract; and (4) the similarity of the diverse contracts found in a given field or kind of transaction.

The motivation to focus on rational-economic factors is threefold. First, the literature on this group of factors is most robust, and ra-

43. *See supra* Part I.A.

tional-economic factors, such as those examined here, recur in the literature⁴⁴ as well as in court rulings.⁴⁵ Yet, there is a gap in the contract literature relating to the particular variables and their impacts on consumer contracting behavior. Second, whereas the actual influence of cognitive and social factors seems to be in dispute,⁴⁶ scholars widely agree that economic factors do play a significant role in consumers' behavior. Third, these factors are more objective in nature and are relatively free of the subjective influences and biases that may occur with cognitive and social factors.

Since the literature does not identify which rational-economic factors have a stronger impact on consumer behavior than others, our hypothesis here is general. We therefore examine next whether and to what degree rational-economic factors influence consumers' intent to read a car rental SFC, both *ex ante* and *ex post*.

A car rental scenario was chosen for several reasons. First, it recurs in court rulings and in the contract literature.⁴⁷ Second, it is relatively common.⁴⁸ Third, a car rental scenario also appears in our first study, in which we found that only 19% of consumers reported an intention to read the contract *ex ante* and 45% reported an intention to do so *ex*

44. Numerous commentators note rational-economic factors as key reasons that lead consumers not to read SFCs *ex ante*. Eisenberg, for instance, argues that “(t)he verbal and legal obscurity of preprinted terms renders the cost of searching out and deliberating on these terms exceptionally high. . . . Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, . . . which are unlikely to be worth the costs of search and processing, and which probably aren’t subject to revision in any event, a rational form taker will typically decide to remain ignorant of the preprinted terms.” Eisenberg, *supra* note 5, at 243. For another example, see Bechuk & Posner, *supra* note 30, at 832 (“Indeed, the cost of becoming informed may exceed the benefit, resulting in rational ignorance of hidden traps in contracts that competition may not dispel.”).

45. See, e.g., the famous case of *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). Negating a standard term that limited the warranty protection for a new car, the court explained that all car manufacturers used the same unfair disclaimer. *Id.* at 385-86.

46. The recent debate between Bar-Gill and Epstein serves as a good example. See Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803 (2008).

47. See, e.g., *Davis v. M.L.G. Corp.*, 712 P.2d 985, 992 (Colo. 1986) (en banc) (involving car rental agent who testified that she had never seen a customer read the reverse side of a rental agreement); Eisenberg, *supra* note 5, at 242 (“[F]orm takers often encounter form contracts under circumstances that encourage the form taker to exert only minimal effort to understand the preprinted terms. Few hurried travelers, for example, will pause to read the boilerplate provisions of their car rental agreements.”); Irma S. Russell, *Got Wheels? Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 LOY. L.A. L. REV. 137 (2006); Stark & Choplin, *supra* note 7, at 688-92 (including a car rental contract as part of a survey).

48. See, e.g., Russell, *supra* note 47, at 139 (opining that the most widespread consumer leasing contract is renting a car) (citing Ralph J. Rohner, *Leasing Consumer Goods: The Spotlight Shifts to the Uniform Consumer Leases Act*, 35 CONN. L. REV. 647, 649 (2003)).

post. Interestingly, among the three scenarios that exhibited low ex ante reading and higher ex post reading, the gap between the two stages was the smallest in this case.

A. *Method*

We present below the sample, the case study, and the questionnaire used in the second study to examine the rational-economic factors that influence consumers' intent to read SFCs ex ante and ex post.

Sample. One hundred and twenty respondents volunteered to fill out questionnaires (see details below). All were students studying toward a Masters degree in management, legal studies or business administration (n=90), or a Bachelors degree in law (n=30).⁴⁹ At least sixty-five respondents were females and at least forty-seven were males (eight respondents did not indicate gender), with various income levels.

Questionnaire. The instructions read: "Described below is an event which each of us may encounter. Please read the event and indicate the extent to which each of the factors listed below will influence your behavior." The ex ante scenario stated: "You have flown out for a two-week vacation You have landed at the local airport and would now like to rent a car for two weeks. There are five car rental counters from which you may rent You randomly choose one of the counters and ask to rent a compact car (category A) for a fortnight. The salesperson hands you a car rental contract for your signature. Please indicate the extent to which each of the factors listed below will influence your intent to read the rental contract in its entirety."

The ex post scenario read: "The day after you rented the car, you took a drive out of town. When you tried to turn on the air conditioning you found out that it was out of order. You called the car rental company to see what could be done. They replied that they were under no obligation to assist you, as you had driven beyond the city limits, and you would have to manage on your own. Given the above, please indicate the extent to which each of the factors listed below will influence your intent to read in its entirety the car rental contract you have already signed."

The list of factors appearing after each scenario read: "Size of the writing (font) used in the contract; density of the print; the (monetary) cost of the car rental; length of the contract (number of pages); type of

49. Thirty students had no prior knowledge in contract or consumer law; ninety students had completed both contract and consumer law courses.

language used in the contract (legal wording, terms, definitions); opportunity to improve or change the contract terms and conditions through negotiation; opportunity to learn important things about the car rental transaction that were not indicated by the salesperson; and the assumption that the other car rental counters would offer contracts with similar conditions and terms.” On both the *ex ante* and the *ex post* scenarios, the volunteers were asked to rate each of the factors on a 1–7 Likert-type scale from 1= no influence, through 4= some influence, to 7= very strong influence.

B. *Results*

Listed in Table 2 and Table 3 below are the factors and mean rating scores (with standard deviations) for the *ex ante* and the *ex post* scenarios, respectively. In each of the tables, the factors are listed according to the mean score, ranking from the highest to the lowest. Generally, results show that all of the factors influenced individual intent to read the SFC in its entirety, both *ex ante* and *ex post*, although some had a significantly stronger impact than others.

Ex ante. The factors that most strongly influenced consumers' intent to read the SFC *ex ante* were cost of transaction, length of contract and opportunity to change/improve contract terms. The factors that ranked lowest on intent to read *ex ante* include contract density, font size, and legal language. To determine whether the rankings significantly differ from each other, paired t-tests were performed. Results show no significant difference between the top three ranking factors, i.e., cost of transaction and length of contract, and between length of contract and opportunity to change/improve contract terms.

However, significant differences were found between the opportunity to change/improve contract terms (ranking third) and the assumption that the other car rental counters would offer contracts with similar conditions and terms (ranking fourth), and all other lower ranking factors. This indicates that although all of the factors had an impact on intent to read SFCs *ex ante*, cost of transaction, length of contract and opportunity to change/improve contract terms had a significantly stronger impact in comparison to the other remaining factors (i.e., similarity to other car rental contracts, density, opportunity to learn new things about the contract, font size and legal language).

TABLE 2. MEAN SCORES, STANDARD DEVIATIONS AND PAIRED COMPARISONS (T-TESTS) OF RATIONAL-ECONOMIC FACTORS INFLUENCING INTENT TO READ EX ANTE

| Factor | Ex ante Mean (stdev) | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|---|----------------------|------------------------------------|------------------------------------|--------------------------|-----------------------------------|-----------------------------------|-----------------------------------|------------------------------------|
| 1. Cost of Transaction | 5.66 (1.41) | .27 (1.95) 1.52, <i>n.s.</i> | .36 (2.03) 1.91, <i>n.s.</i> | .87 (1.92) 4.87*** | .92 (1.81) 5.47*** | .96 (2.19) 4.74*** | .98 (1.74) 6.05*** | 1.14 (2.00) 6.17*** |
| 2. Length of Contract | 5.39 (1.50) | | .08 (2.02) .46, <i>n.s.</i> | .59 (2.10) 3.04** | .64 (1.42) 4.87*** | .69 (2.00) 3.71*** | .70 (1.35) 5.63*** | .87 (1.67) 5.61*** |
| 3. Opportunity to Change or Improve Contract Terms | 5.30 (1.58) | | | .50 (1.83) 2.98** | .56 (2.04) 2.95** | .60 1.94 3.34*** | .62 (1.96) 3.40*** | .78 (1.87) 4.49*** |
| 4. Similarity (Other Car Rental Contracts) | 4.79 (1.63) | | | | .52 (2.04) .27, <i>n.s.</i> | .09 (1.85) .55, <i>n.s.</i> | .11 (1.92) .62, <i>n.s.</i> | .27 (1.92) 1.54, <i>n.s.</i> |
| 5. Density | 4.74 (1.53) | | | | | .04 (2.12) .21, <i>n.s.</i> | .06 (.81) .79, <i>n.s.</i> | .22 (1.55) 1.55, <i>n.s.</i> |
| 6. Opportunity to Learn New Things About the Contract | 4.70 (1.60) | | | | | | .01 (2.11) .08, <i>n.s.</i> | .18 (1.95) 1.00, <i>n.s.</i> |
| 7. Size (Font) | 4.68 (1.44) | | | | | | | .16 (1.46) 1.20, <i>n.s.</i> |
| 8. Legal Language | 4.52 (1.62) | | | | | | | |

* $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$
2-tailed tests

Ex post. The factors that most strongly influenced consumers' intent to read the SFC *ex post* were cost of transaction, opportunity to learn new things and opportunity to change/improve contract terms. The factors that ranked lowest on intent to read *ex post* include length of contract, contract density and font size. To determine whether the rankings significantly differ from each other, paired t-tests were performed. Results indicate that there is no significant difference between the top two ranking factors, i.e., cost of transaction and opportunity to learn. Also, there is no significant difference between the second and third ranking factors, i.e., opportunity to learn and opportunity to change or improve contract terms.

However, significant differences were found between opportunity to learn and opportunity to change/improve contract terms (ranking third) on one hand, and all other lower ranking items on the other. This indicates that although all of the factors had an impact on intent to read SFCs *ex post*, cost of transaction and the opportunity to learn had a significantly stronger impact in comparison to the other remain-

ing factors (i.e., opportunity to change/improve contract terms, legal language, length of contract, density and font size).

TABLE 3. MEAN SCORES, STANDARD DEVIATIONS, AND PAIRED COMPARISONS (T-TESTS) OF RATIONAL-ECONOMIC FACTORS INFLUENCING INTENT TO READ EX POST

| Factor | Ex post Mean (stdev) | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|---|----------------------|------------------------------------|------------------------------------|---------------------------|------------------------------------|-----------------------------------|------------------------------------|------------------------------------|
| 1. Cost of Transaction | 5.77 (1.48) | .29 (1.82) 1.73, <i>n.s.</i> | .55 (1.77) 3.35*** | 1.62 (2.02) 8.64*** | 1.81 (1.94) 10.01*** | 1.83 (1.89) 10.42*** | 1.87 (1.88) 10.76*** | 1.88 (1.88) 10.80*** |
| 2. Opportunity to Learn New Things About the Contract | 5.47 (1.78) | | .25 (1.86) 1.49, <i>n.s.</i> | 1.32 (2.12) 6.72*** | 1.51 (2.32) 7.04*** | 1.54 (2.34) 7.07*** | 1.58 (2.41) 7.08*** | 1.59 (2.39) 7.15*** |
| 3. Opportunity to Change or Improve Contract Terms | 5.22 (1.85) | | | 1.06 (2.01) 5.72*** | 1.25 (2.28) 5.93*** | 1.28 2.20 6.27*** | 1.32 (2.19) 6.51*** | 1.33 (2.15) 6.69*** |
| 4. Similarity (Other Car Rental Contracts) | 4.15 (1.97) | | | | .19 (1.73) 1.17, <i>n.s.</i> | .21 (1.96) 1.17 <i>n.s.</i> | .25 (1.93) 1.14, <i>n.s.</i> | .26 (1.83) 1.56, <i>n.s.</i> |
| 5. Legal Language | 3.96 (1.89) | | | | | .02 (1.23) .22, <i>n.s.</i> | .06 (1.26) .58, <i>n.s.</i> | .78 (1.25) .66, <i>n.s.</i> |
| 6. Length of Contract | 3.93 (1.89) | | | | | | .04 (1.00) .46, <i>n.s.</i> | .05 (0.99) .56, <i>n.s.</i> |
| 7. Density | 3.89 (1.86) | | | | | | | .00 (0.58) .15, <i>n.s.</i> |
| 8. Size (Font) | 3.88 (1.88) | | | | | | | |

* $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$
2-tailed tests

C. Discussion and Implications

In general terms, all the factors examined in this study clearly influence consumers' intended contracting behavior. However, some factors are more dominant than others. Based on the findings of this study, the discussion below includes some preliminary yet tailored recommendations for regulators and administrators – who regulate consumer transactions or promote efficiency and fairness at the ex ante stage – and for courts, which protect consumers from hidden biased terms after a legal dispute has surfaced.

Some commentators logically argue that expensive consumer transactions should be closely scrutinized. The rationale for regulating markets where expensive transactions are at stake is fairly straightforward: the fear that consumers will suffer greatly from imperfect information in such markets, where high-priced goods or services are

purchased. Nevertheless, insofar as imperfect information is indeed the main concern that worries academics and policymakers, our study casts doubt on the wisdom of regulating, first and foremost, expensive consumer transactions. Consumers report that the cost of the transaction at stake has the strongest influence on their propensity to read the contract.⁵⁰ This means that consumers who enter expensive deals are more likely to take more precautions, such as, *inter alia*, reading the contract prior to entering the agreement, and hence, becoming acquainted with its content.⁵¹ From this perspective, consumers might in fact need *less* protection against hidden terms in costly transactions, not more.⁵²

As we have seen, the second most important factor in consumers' decision whether or not to read an SFC *ex ante* is the length of the contract.⁵³ A long contract deters consumers from reading it, whereas a short one enhances the likelihood that they will. Regulators and consumer protection proponents may do well to focus their attention on shortening contracts. Since the length of the contract does not deter consumers from reading SFCs *ex post*,⁵⁴ such initiatives are most valuable in fields of commerce where a strong *ex post-ex ante* information flow is not present.

Diverse reasons contribute to the phenomenon of drafting long contracts.⁵⁵ However, employing various means can mitigate this reality. A few such suggestions follow – regrettably very truncated. One possibility is to use a pre-approval mechanism, which will approve fair and efficient contract terms while flagging or framing problematic ones.⁵⁶ Another is to allow consumer protection bodies to compare

50. Assuming they can correctly assess it, of course. This correlates with the results of the second study of Stark & Choplin, *supra* note 7, at 694, which indicate that consumers are more likely to read SFCs when important transactions are at stake.

51. This is aside from the fact that consumers typically consult a legal expert once a very expensive purchase, such as a home purchase, is at stake.

52. However, protection against other unfair practices – rather than hidden biased contractual provisions – might indeed be warranted. Our policy recommendations refer merely to protection from biased contract terms.

53. Interestingly, this finding contradicts the first study of Stark & Choplin, *supra* note 7, at 678-80, which suggests that even when the SFC is rather short (just over two pages), consumers will nevertheless tend not to read it. However, it should be clear that the various factors work together. Thus, for instance, it might be that where the importance of the transaction is negligible, consumers will not read even short forms.

54. One possible explanation for this difference is that reading *ex post* is focused, centered on the problem that surfaced (rather than on the contract as a whole).

55. See, e.g., Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words*, 79 CHI. KENT L. REV. 889 (2004) (arguing that American contracts are long and detailing the possible reasons for this phenomenon).

56. See Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747 (2009) (developing the

the different contracts that can be found in any given field, and to publicize the results. This may promote the reputation of sellers who use short contracts. Additionally, governmental agencies and consumer organizations might provide consumers with websites that invite consumers to share their thoughts and insights about the contracts they are offered (“How’s my contract?” websites).⁵⁷ In these sites, special attention ought to be paid to the length of the contracts.

Next is the possibility of changing or improving the terms of SFCs. Our respondents reported that this was the third factor that influenced their intent whether to read SFCs *ex ante* as well as *ex post*. Actually, this facet goes back to the notorious “take-it-or-leave-it” nature of SFCs. Much ink has been spilt on this issue, and many writings base their consumer protection agenda on the fact that consumers cannot negotiate or alter form contract clauses. Consequently, legislatures and courts might indeed be wary wherever consumers cannot change the contracts that vendors offer. This is not necessarily because consumers lack the ability to negotiate the terms sellers offer, but because this reality undermines consumers’ willingness to read SFCs in the first place.

At the same time, in some areas of commerce – such as Digital Rights Management (DRM) – consumers can choose some of the features of the relevant contract.⁵⁸ In these areas of commerce, *ex ante* regulatory intervention seems much less justified. Once again, this is so not only because consumers can *in fact* choose some contractual components in the contract they enter. Rather, it is the mere *possibility* of choosing one’s terms that implies a greater tendency by consumers to read the contract (even if the consumer chooses to stick to the proposed/default terms). Hence, regulators should promote additional tools that encourage and broaden consumers’ ability to choose the terms of their contracts, thus promoting consumers’ tendency to read SFCs.

idea of a third-party pre-approval mechanism for SFCs); Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162922.

57. See, e.g., <http://www.gripe2ed.com/scoop/>; www.eff.org/wp/eula.php (collecting examples of unfavorable terms); www.fairterms.org/EULALibrary.htm (collecting links to sites with biased terms). Interestingly, the efficacy of online social networks and their power to generate consumer resentment, and thus combat unfair contract terms, has been recently illustrated in the context of Facebook’s attempt to change its TOS (Terms of Service). For one report, see Daniel Lonescu, *Facebook’s Zuckerberg Calms Privacy Fears Over TOS Change*, PC WORLD, Feb. 17, 2009, http://www.pcworld.com/article/159636/facebooks_zuckerberg_calms_privacy_fears_over_tos_change.html?loomia_ow=t0:a16:g12:r1:c0.524434:b22071290.

58. In such relevant transactions, consumers can choose the duration of use, the allowed uses, and so on.

Moreover, attributing much significance to the possibility of changing or improving terms may support the fear that sellers will discriminate among their consumers *ex post*. As explained, this can be done by providing relief to assertive or vocal consumers, regardless of the contract's language. Such (*ex post*) discrimination implies that sophisticated or assertive consumers will obtain relief after a dispute arises, whereas lay consumers – who do not persist on their claims – will not.⁵⁹ As consumers consider the possibility of improving contract terms an important factor in their decision to read SFCs at the *ex post* stage, the concern that sellers will indeed choose to discriminate *ex post* is further aggravated.

To foster contract reading, commentators and legislatures advocate for plain language laws.⁶⁰ Such initiatives suggest encouraging (or obliging) sellers to use simple language that reasonably educated consumers are able to understand, rather than legal gobbledygook. This has influenced not only legislatures but public campaigns as well.⁶¹ Arguably, using plain language makes it easy for consumers to become familiar with SFCs.

Quite surprisingly, however, our study indicates that the legal language used in SFCs proved the weakest of the rational-economic factors we examined in propelling consumers' tendency not to read SFCs *ex ante*. Legal jargon was not one of the key factors at the *ex post* stage, either.⁶² This is also true with respect to contracts' visual features, *i.e.*, font size and print density. These were less significant when the respondents were deciding whether they would tend to read the contract, both *ex ante* and *ex post*. According to these findings, regulating the visual aspects of the contract will not necessarily yield a real change in consumer contracting behavior. Hence, legislatures and courts should not focus primarily on such factors.

59. See also Bebchuk & Posner, *supra* note 30 (noting that reputation concerns will lead vendors to insist on one-sided contract terms only in response to opportunistic behavior on the part of buyers); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of how Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 MICH. L. REV. 857, 876 (2006) (providing anecdotal evidence which demonstrates that virtually everything relating to SFCs can be re-negotiated *ex post* if consumers adopt an assertive attitude). In addition, some have argued that people, and especially women, fear the negotiation procedure. In such cases, even if negotiating might result in better terms, those consumers who fear the process will choose not to read the SFC or negotiate its terms. See Stark & Choplin, *supra* note 7, at 670-71.

60. See, *e.g.*, Plain Language Contract Act, MINN. STAT. ANN. § 325G.29-36 (2010).

61. See, *e.g.*, Plain English Campaign, <http://s190934979.websitehome.co.uk/> (last visited May 26, 2010).

62. Yet, there is the possibility that our respondents – some of whom are law school students – did not attribute much importance to this factor, due to their skills and education. Further research is warranted at this point.

At this point, two qualifications are in order. First, as we emphasize throughout this Essay, we rely on consumers' reports regarding their inclination to read SFCs. We did not measure actual consumer behavior. Of course, there might be a difference between what consumers report and how they actually respond.⁶³ Although measuring intended behavior is an acceptable method, we acknowledge that self-reporting measures are naturally subject to sampling errors. In this context, consumers as a class might err in assessing the impact of the contracts' font size and print density (for instance) on their willingness to read. Therefore, we hope that future research will focus on the measurement of actual consumer behavior, in laboratory or real-life field settings, and use different techniques, such as observation and interviewing. Second, we do not argue that plain language initiatives or regulating font size are useless. As noted, all the factors presented in this study do seem to influence the way consumers behave. We do claim, however, that other factors seem to play a more central role in consumers' decision-making, and thus should receive more scholarly and regulatory attention.

Last is the assumption that consumers do not read SFCs because (at least in some industries) sellers often offer similar contracts. Interestingly, the data of this study illustrates that similarity among contracts is not one of the most important key factors – either *ex ante* or *ex post* – in consumers' decisions on whether to read a contract.⁶⁴ Hence, contrary to common views, similarity among contracts is not the leading rationale for justifying special and strong regulatory scrutiny or judicial intervention.

We would like to end this discussion with a caveat. The second study presented in this part involved one scenario in one culture. Although Western common-law countries share many fundamental (le-

63. Furthermore, the sample population of this study was comprised of students pursuing bachelors or masters degrees. It may be argued that this sample is not representative of the general population, and that no student would openly admit to waive the opportunity to learn new and important things (especially when this knowledge may significantly impact the type of services to which they will or will not be entitled). In other words, using a student population may limit how generalized of these results. However, we note again the heterogeneous group of students in our sample. We hope that our findings will guide future research that will focus on measuring actual consumer behavior in similar scenarios. Until such data is gathered and analyzed, the results of this study can definitely be of real significance to researchers, legislators and policymakers.

64. This finding can be explained in a few ways. First, consumers might assume that reading a contract and becoming familiar with its content will allow them to decide whether to pursue the transaction. Second, becoming familiar with a contract is an effort that might serve consumers later on when considering the same transaction in the future. Third, contracts might be similar but not identical. Thus, consumers who become familiar with the pitfalls and advantages of one contract might focus their attention on similar aspects when shopping among other contracts.

gal and societal) concepts, one's attitude toward reading legal documents, such as an SFC, might be shaped by context, societal norms and cultural habits. Accordingly, we hope that future studies examine additional scenarios across different cultures.

V. CONCLUSION

The literature provides competing narratives about consumer contracting behavior, all different in nature. One narrative assumes that consumers simply do not read SFCs, and are thus exposed to biased contracts. Another presumes that a substantial minority of consumers read contracts and discipline sellers, and thus, that there is basically no need to intervene in competitive consumer markets. A third speculates that consumers tend to read contracts after the fact. According to this claim, consumer protection initiatives are mostly justified where a strong information flow from experienced consumers (who read *ex post*) to potential consumers (at the *ex ante* stage) does not exist.

Each narrative rests on different assumptions. Not surprisingly, therefore, academics propose and advance diverse solutions to the alleged problems that consumer contracts pose to traditional contract law. Some reveal a strong tendency to regulate consumer transactions *ex ante*. Others call on courts to be active in protecting consumers from one-sided contracts. Yet others doubt whether legal intervention is cost-effective, and whether it is indeed required. One way or another, consumer contract law is largely based on assumptions that have never been contested.

This Essay aspired to broaden our understanding as to the real nature of consumer contracting behavior. To achieve this goal, we designed two studies. The first examined consumers' intent to read SFCs, whereas the second explored the rational-economic factors that influence that intent. We hope that the results of these studies can assist courts and legislatures in their efforts to better mitigate the problems caused by SFCs. Of course, this is merely a first and modest step. Consumers' contracting behavior raises many intriguing issues yet to be explored.

